7

No. 91-913

In The
Supreme Court of The United States

October Term, 1991

JOHN R. PATTERSON

Trustee, Petitioner,

v.

JOSEPH B. SHUMATE, JR.

Respondent

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE DAVID B. TATGE, TRUSTEE, URGING REVERSAL AND REMAND

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Pursuant to Rule 37.4 of the Rules of the Court, Amicus Curiae David B. Tatge, Trustee, moves for leave to file the attached *amicus curiae* brief, urging REVERSAL and REMAND. Neither party has given Tatge the written consent to filing of an *amicus curiae* brief which he requested under Rule 37.3, requiring that this motion be filed.

Tatge is the Chapter 7 Trustee in Bankruptcy for debtor Valerie D. Cheaver in Case No. 90-00295, now pending before the United States Bankruptcy Court for the District of Columbia. Tatge also is the appellant in Appeal No. 91-7097, *David B. Tatge, Trustee v. Valerie D. Cheaver and The Medlantic Healthcare Group Cash Balance Retirement Plan,*

now pending before the United States Court of Appeals For The District of Columbia Circuit. This appeal was stayed on February 4, 1992 after this Court granted Certiorari in the instant case.

Under Medlantic's tax qualified pension plan, Cheaver has the right to demand payment in full of her vested benefits upon any voluntary termination of employment, even before normal or early retirement. Cheaver claimed exemption for her pension rights under the "federal" pension exemption statute, 11 U.S.C. §522(d)(10)(E). Tatge's appeal is from an unreported decision of the United States District Court for the District of Columbia, *Tatge v. Cheaver (In re Cheaver)*, C.A. 91-57 (D.D.C. May 29, 1991), which affirms a reported decision of the United States Bankruptcy Court for the District of Columbia *Tatge v. Cheaver (In re Cheaver)*, 121 Bankr. 665 (Bankr. D.D.C. 1990) dismissing an adversary proceeding for turnover of Cheaver's interest in the Medlantic's plan, on the basis that ERISA §206(d)(1) represents "applicable nonbankruptcy law" for purposes of §541(c)(2) of the Bankruptcy Code.

Tatge's brief supports the Petitioners' argument that ERISA §206(d)(1) is not "applicable nonbankruptcy law" for purposes of §541(c)(2), and that as a result a debtor's rights under ERISA pension plans are property of the bankruptcy estate. However, Tatge's position differs from that of the parties before the Court in that he urges that the difficult issue of whether ERISA represents "Federal law other than subsection (d)" for purposes of §522(b)(2)(A) (a provision applicable if "state" exemptions are utilized) be decided on remand. This issue was not addressed by the Fourth Circuit.

Tatge's brief raises issues and advances arguments concerning §541(c)(2) not raised or advanced by the Petitioner in the Petition For Writ Of Certiorari, the Respondent in Opposition to the Petition, or in Petitioner's Reply, namely:

- The term "applicable nonbankruptcy law" as used in §541(c)(*l*) of the Bankruptcy Code refers to "local rules of transferability", which strongly suggests that when Congress used the same term in §541(c)(2), it was referring to state law as well;

- §522(d)(10)(E), and in particular subsection (iii), demonstrates that rights under all pension plans which are tax qualified under §401(a) of the Internal Revenue Code, be included in the bankruptcy estate;

- Language from the Report of The Commission on Bankruptcy Laws of The United States establishes that §522(d)(10)(E) is not a "catchall" intended to apply only to government, church and nonqualified plans after most ERISA plans have previously been excluded from the estate under §541(c)(2);

- §522(d)(10)(E) is intended to exempt presently vested rights to plan benefits which are distributable only at a future time, requiring that these rights to corpus be exempt under §522(d)(10)(E) and not excluded under §541(c)(2);

- §522(b)(2)(B) establishes that the term "applicable nonbankruptcy law" is ambiguous, requiring review of the legislative history of §541(c)(2);

- A blanket exclusion for ERISA qualified pension plans under §541(c)(2) would be a significant change in pre-Code practice, and inconsistent with the legislative history;

- The Bankruptcy Code, like federal tax lien law, overrides ERISA anti-alienation clauses;

- Seven cases which establish that turnover of plan benefits to the trustee, where appropriate, will not disqualify the plan;

- ERISA does not pre-empt state law exemptions for ERISA qualified plan rights, overriding possible concerns that

including pension rights in the bankruptcy estate will force debtors to the Hobson's choice of electing "federal" exemptions so as to exempt their pension rights, and thereby losing valuable state law homestead and tenancy by the entirety exemptions, or vice versa; and

- Including ERISA pension rights as property of the estate will not conflict with ERISA's goal of uniformity.

While it is likely that some of the foregoing issues may be addressed by the parties in their briefs on the merits (because Movant has raised many of these issues and suggested arguments and authorities to Petitioner's counsel), Movant has no reason to believe that all of the foregoing issues will be addressed or, if addressed at all, that they will be fully presented. Each of the foregoing issues raised above should be considered by this Court in making its decision.

Finally, one of the major arguments supporting Petitioner's position with respect to §541(c)(2) concerns §522(d)(10)(E). That statute is not applicable to Mr. Shumate because Virginia is an "opt out" state. It is, however, directly applicable to the *Cheaver* case as the basis for Cheaver's asserted pension exemption. Movant should be heard on the §522(d)(10)(E) issue, and its relationship to §541(c)(2). Several of the foregoing issues and related arguments have not been fully considered by the lower courts because they arise only in the context of a case where federal exemptions are chosen by the debtor, and research has not revealed the strong comprehensive analysis which Tatge seeks to bring to the attention of this Court in his *amicus curiae* brief.

WHEREFORE, having shown a significant interest in the outcome of this case, *i.e.* the unique and important argument of a bankruptcy trustee in the circumstances of a debtor who chose "federal" exemptions, and an extensive analysis of questions of law and legal authorities that have not been raised by either party, Amicus Curiae Tatge prays that his motion for leave to file *amicus curiae* brief be GRANTED, and for such other and further relief as is just and proper.

Respectfully submitted,

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Dated: March 6, 1992

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

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BRIEF OF AMICUS CURIAE DAVID B. TATGE, TRUSTEE, URGING REVERSAL AND REMAND

INTEREST OF THE AMICUS CURIAE

Amicus Curiae David B. Tatge ("Tatge") is Trustee in Bankruptcy in *In re Valerie D. Cheaver*, Case No. 90-00295, filed under Chapter 7 of the Bankruptcy Code and now pending in the United States Bankruptcy Court for the District of Columbia. Pursuant to Rule 37.3 of the Supreme Court Rules Tatge sought, unsuccessfully, the consent of both parties to filing of an Amicus Curiae brief. Accordingly, Tatge's Motion For Leave To File Amicus Curiae Brief is filed under Rule 37.4 concurrently herewith.

Tatge is the appellant in Appeal No. 91-7097, *David B. Tatge, Trustee v. Valerie D. Cheaver and The Medlantic Healthcare Group Cash Balance Retirement Plan*, now pending before the United States Court of Appeals For The District of Columbia Circuit. This appeal was stayed on February 4, 1992 after this Court granted Certiorari in the instant case.

Under Medlantic's tax qualified pension plan, Cheaver has the right to demand payment in full of her vested benefits upon any voluntary termination of employment, even before normal or early retirement. Cheaver claimed exemption for her pension rights under the "federal" pension exemption statute, 11 U.S.C. §522(d)(10)(E). Tatge's appeal is from an unreported decision of the United States District Court for the District of Columbia, *Tatge v. Cheaver (In re Cheaver)*, C.A. 91-57 (D.D.C. May 29, 1991), which affirms a reported decision of the United States Bankruptcy Court for the District of Columbia *Tatge v. Cheaver (In re Cheaver)*, 121 Bankr. 665 (Bankr. D.D.C. 1990) dismissing an adversary proceeding for turnover of Cheaver's interest in the Medlantic's plan, on the basis that ERISA §206(d)(1) represents "applicable nonbankruptcy law" for purposes of §541(c)(2) of the Bankruptcy Code.

Tatge's brief, which supports a result not sought by Petitioner or Respondent, brings to the attention of the Court several relevant authorities not raised in either Patterson's Petition for Writ of Certiorari, Shumate's Brief in Opposition, or the Petitioner's Reply. Although Tatge supports the Petitioner's position that a debtor's rights under an ERISA pension plan are "property of the estate" in bankruptcy cases, he asserts, however, that whether ERISA is "other Federal law" which permits debtors choosing state exemptions to wholly exempt such benefits is not properly before this Court. Accordingly, Tatge urges REVERSAL AND REMAND.

If this Court concludes that ERISA pension rights are "property of the estate," the Fourth Circuit should on remand determine, in the first instance, whether debtors choosing state exemptions may wholly exempt such benefits solely by virtue of the plan being ERISA-qualified. This Court's interpretation of the scope of §541(c)(2), however, will be more fully dispositive in *In re Cheaver*, because Ms. Cheaver chose "federal" exemptions under 11 U.S.C. §522(b)(1).

SUMMARY OF ARGUMENT

Under §541(a) and §541(c)(1) of the Bankruptcy Code (Title 11, U.S.C. §101, *et seq.*), except as provided in §541(c)(2), an interest of the debtor in property becomes property of the bankruptcy estate under §541(a)(1), 541(a)(2), or 541(a)(5), notwithstanding any provision in an agreement, transfer instrument or "applicable nonbankruptcy law" that restricts or conditions transfer of such interest by the debtor. For this purpose "property," except as provided in §541(b) and §541(c)(2) of the Bankruptcy Code, includes all legal and equitable interests of the debtor in property as of the commencement of the case.

Under §541(c)(2), "a restriction on the transfer of a beneficial interest by the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title" [title 11]. The issue before this Court is whether §206(d)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA," 29 U.S.C. §1001 *et seq.*) represents "applicable nonbankruptcy law" for purposes of §541(c)(2) of the Bankruptcy Code. The Fourth Circuit Court of Appeals held below that §206(d)(1) is "applicable nonbankruptcy law" and excluded from the bankruptcy estate Respondent Shumate's rights under the Coleman Furniture Company Pension Plan (the "CFC" Plan).

This was error. "Applicable nonbankruptcy law" for purposes of §541(c)(2) does not include §206(d)(1) of ERISA. Instead, "applicable nonbankruptcy law" means state spendthrift trust law. First, reference to the legislative history of §541(c)(*1*) in the Report of the Commission On Bankruptcy Laws of the United States establishes that the term "applicable nonbankruptcy law," the same term used in §541(c)(*2*), the provision here at issue, refers to "local rules of transferability." Applying well-accepted rules of statutory construction,

identical words used in different parts of the same act are intended to have the same meaning. This is particularly true where, as here, identical words are used in the same section of the same act. Thus, §541(c)(1) and (2) should be construed consistently. "Applicable nonbankruptcy law" means state law for purposes of §541, and ERISA pension rights are property of the bankruptcy estate.

The "plain meaning" of §522(d)(10)(E) of the Bankruptcy Code, and in particular §522(d)(10)(E)(iii), establishes clearly that Congress intended a debtor's rights under a plan tax qualified under §401(a) of the Internal Revenue Code – such as the CFC Plan – to come into the bankruptcy estate, and later be claimed as exempt, rather than to be excluded from the bankruptcy estate altogether under §541(c)(2).

The debtor's pension plan here is a §401(a) tax qualified plan. Under ERISA, it must contain an anti-alienation clause to maintain tax-exempt status. ERISA §206(d(1); 29 USC §1056 (d)(1); IRC §401(a)(13). If §206(d)(1) ERISA were "applicable nonbankruptcy law" under §541(c)(2), then the debtor's rights under the plan would not be property of the estate. If this were the case, there would be nothing to "exempt" under §522(d)(10)(E), making that statute superfluous as to such pension funds. No other reading of §522(d)(10)(E) makes sense.

Two interpretations of §522(d)(10)(E) have been advanced which purport to give it content even if ERISA pension rights are excluded from "property of the estate" under §541(c)(2). Upon examination, both fail. First, some courts have found that §522(d)(10)(E) is a "catch-all," applying only to rights under those few plans, such as government, church, or nonqualified plans, which are not required by ERISA to have or do not otherwise contain an anti-alienation clause. The Report of the Commission On Bankruptcy Laws establishes clearly that this is not the case. It shows that a "reasonable necessity" standard was placed in §522(d)(10)(E) in order to limit exemption of "very substantial" benefits by "members of professional corporations" and "officers." Churches and governments are not professional corporations and their employees are not members or officers of professional corporations. The substantial benefits which concerned Congress are certainly more likely to accrue in private sector plans, where salaries are higher, and in tax qualified plans, where earnings build up tax-free, rather than in nonqualified plans. To limit §522(d)(10)(E) to pension rights under church, government and nonqualified plans is to flatly disregard that section's primary purpose.

It also has been suggested that §522(d)(10)(E) could still have meaning, even if ERISA pension rights were excluded from the bankruptcy estate, because that provision would still govern distributions under the plan during the pendency of the bankruptcy. This argument also fails. Congress did not intend that §522(d)(10)(E) be limited to exempting only pension rights which are in pay or over which the debtor has a right to take present distribution. Case law establishes, consistent with pre-Code law, that the §522(d)(10)(E) exemption also encompasses present vested rights to benefits distributable only at a future date. Therefore, Congress could not have intended to exclude these rights to corpus from the bankruptcy estate, *ab initio*, under §541(c)(2). Finally, reference to the state law tenancy by the entireties exemption (where available) establishes that a mere change in form of the entireties property into cash will not necessarily result in the property being subjected to the claims of non-joint creditors. Rather, it will remain exempt in most cases. By analogy, property, once excluded under §541(c)(2), would remain excluded, even if it changed in form to cash proceeds – *i.e.*, to distributions from an excluded pension plan.

The term "applicable nonbankruptcy law" is ambiguous. As used in 11 U.S.C. §522(b)(2)(B), "applicable nonbankruptcy law" refers solely to state law (concerning property rights as tenancies by the entirety), which rebuts the Fourth Circuit's claim that this language always refers to both state and federal law, absent an express limitation to state law alone. Because "applicable nonbankruptcy law" is ambiguous, the legislative history of §541(c)(2) should be consulted, which clearly shows Congress' intent merely to

"carryover" the exclusion of state law spendthrift trusts that existed under prior law. Moreover, a blanket ERISA exclusion under §541(c)(2) would be a drastic change in pre-Code law. Because there is no evidence in the legislative history that Congress intended such a change, this court should hold that "applicable nonbankruptcy law" under §541(c)(2) is limited to rights under spendthrift trusts recognized by state law.

ERISA does not supersede, alter, or impair any federal laws of the United States other than pension laws. Accordingly, an ERISA anti-alienation clause falls to other federal laws. This principle has been recognized with respect to a federal tax lien statute, and it should be so recognized as to the Bankruptcy Code as well. Cases holding that ERISA controls over conflicting state law are inapposite.

It has been suggested that allowing creditors, through the trustee, to reach an individual debtor's ERISA pension plan rights would cause the entire plan to lose its tax-exempt status. Courts have uniformly rejected this argument. Seven reported decisions establish, without any precedent to the contrary, that including the pension rights within the bankruptcy estate and ordering turnover, where appropriate, will not disqualify the plan.

Nor is a tortured construction of §541(c)(2) necessary to permit a debtor to claim favorable state law homestead and tenancy by the entireties exemption rights, as ERISA does not pre-empt state exemption of pension rights. Rather, an election to take state exemptions of pension rights, where it is available, ensures the debtor's "fresh start," a principal goal of the Bankruptcy Code. ERISA does not pre-empt state law which accomplishes this federal goal.

Finding for the Petitioner will not conflict with ERISA's goal of uniform treatment of pensions. Uniform treatment of pension plans is available under §522(d)(10)(E), the applicable federal exemption. Moreover, if ERISA constitutes "other federal law" for purposes of 11 U.S.C. §522(b)(2)(A), an issue which Tatge suggests should be decided by the Fourth Circuit on remand, there would be a uniform exemption as well for

ERISA plan rights for debtors who choose "state" exemptions. Thus, there is no need to adopt a tortured construction of §541(c)(2) to achieve this policy result.

Finally, because the difficult issue of whether 206(d)(1) of ERISA is "Federal law other than subsection (d)" for purposes of §522(b)(2)(A) is not properly before the Court, this cause should be REVERSED and REMANDED.

ARGUMENT

I. THE TERM "APPLICABLE NONBANKRUPTCY LAW" FOR PURPOSES OF 11 U.S.C. §541(c)(2) IS LIMITED TO STATE SPENDTHRIFT TRUST LAW AND DOES NOT ENCOMPASS §206(d)(1) OF ERISA.

A. Section 522(d)(10)(E)(iii), as applicable to a debtor choosing "federal" exemptions under §522(b)(1), which conditions exemption for rights under a pension plan established by an "insider" (such as Mr. Shumate) on the plan being qualified under §401(a), 403(a) 403(b), 408 or 409 of the Internal Revenue Code, establishes that a debtor's rights under all such "tax qualified" plans cannot be excluded from "property of the estate" under §541(c)(2), which would render §522(d)(10)(E)(iii) superfluous.

1. The legislative history of Section 522(d)(10)(E) demonstrates that a debtor's rights under a §401(a) tax qualified plan subject to ERISA are intended to be covered by exemption under §522, rather than exclusion under §541(c)(2).

The unambiguous statutory language of Section 522(d)(10)(E)(iii) of the Bankruptcy Code (11 U.S.C. §101, *et seq.*) and in particular subparagraph (iii) thereof establishes, without question, that rights under a tax qualified pension plan cannot, solely by virtue of the plan containing an anti-alienation clause required by ERISA, be excluded from the bankruptcy estate under §541(c)(2) of the Bankruptcy Code.

By way of background, the broad sweep of the definition of "property" belonging to the bankruptcy estate under Section

541(a) of the Bankruptcy Code encompasses all legal or equitable interests of the debtor, wherever located or by whomever held, subject only to limited exclusions under 11 U.S.C. §541(b) and 11 U.S.C. §541(c)(2). Under the latter, "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title," thereby excluding the associated property from the bankruptcy estate.

The Bankruptcy Code permits debtors, unless the State law applicable in the debtor's domicile limits exemptions to those available under state law,[1] to choose between claiming uniform "federal" property exemptions, pursuant to 11 U.S.C. §§522(b)(1) and (d), or (2) "state" exemptions, namely (A) both (i) property exempt under Federal law, other than 11 U.S.C. §522(d) and (ii) property exempt under state or local law applicable on the date of filing of the petition at the place the debtor's domicile has been located for the past 180 days, together with (B) any interest of the debtor as a tenant by the entirety or a joint tenant, to the extent that such interest is exempt from process under applicable nonbankruptcy law.

Section 522(d)(10)(E)(iii) of the Bankruptcy Code conditions exemption of a debtor's right to receive payments under a plan established by or under the auspices of an "insider" on the plan being "tax qualified" under §401(a),[2] 403(a), 403(b), 408 or 409 of the Internal Revenue Code (26 U.S.C. 001, *et. seq.*). It is obvious that, in order for this statutory language to be given effect, rights under tax qualified plans must be included in property of the estate under §541(a), and *not* subject to exclusion under §541(c)(2).

Here, Coleman Furniture Company ("CFC") is an "insider" of Respondent Shumate under 11 U.S.C. §101(31)(A)(iv)), and the CFC Pension Plan is a tax qualified pension plan under

1. Jurisdictions which have not opted out and permit debtors to elect either "federal" exemptions under §522(d) or applicable State exemptions include the District of Columbia.

2. Generally a corporate pension or profit sharing plan, or an H.R. 10 or "KEOGH" plan applicable to partners and sole proprietors.

§401(a) of the Internal Revenue Code. However, §522(d)(10)(E) is not the governing exemption provision in the instant case because Respondent Shumate lives in Virginia, which like certain other states has "opted-out" of the choice of "federal" exemptions provided under §§522(b)(1) and (d) of the Bankruptcy Code.[3] This is not of any consequence, as there are other debtors who are similarly situated to Mr. Shumate, but live in non opt-out states and choose federal exemptions. If, as to these debtors, §206(d)(1) of ERISA were "applicable nonbankruptcy law" for purposes of §541(c)(2), then §522(d)(10)(E)(iii) could not operate as intended. All rights to payments under the plan in question would already have been excluded from the estate under §541(c)(2), making §522(d)(10)(E) superfluous. This Court has previously stated its "[d]eep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Freytag v. Commr.*, ___ U.S. ___, 111 S.Ct. 2631, 2638 (1991). It would be a grave injustice to hold that the ambiguous term "applicable nonbankruptcy law" under §541(c)(2) encompasses §206(d)(1) of ERISA and excludes rights under a §401(a) tax qualified pension plan, when the effect is to override the unambiguous statutory language of §522(d)(10)(E)(iii), which on its face establishes that this cannot have been Congress' intent.

2. Congress did not enact §522(d)(10)(E) as a "catchall" provision applicable only to rights to payments under government, church and nonqualified plans (with all other ERISA pension rights to be excluded from the bankruptcy estate under §541(c)(2)).

Certain courts have attempted to harmonize an ERISA exclusion under §541(c)(2) with the language of §522(d)(10)(E) by determining that §522(d)(10)(E) is a "catchall." After excluding rights under all tax qualified plans required by ERISA to have an anti-alienation clause under §541(c)(2), these courts attempt to give content to §522(d)(10)(E)(iii) by supposing that Congress intended it to be applicable to rights

3. Virginia Code §34-31.

under (i) a tax qualified pension or profit sharing plan not required by ERISA to contain an anti-alienation clause, such as a church or government plan, or (ii) a nonqualified or disqualified plan if either the plan was not established by an insider to the debtor, or the payment was not on account of age or service. *See, e.g., In re Cheaver, supra.* This rationale fails completely.

Thus, under §4-503 ("Exemptions") in the Report of the Commission on the Bankruptcy Laws of the United States (hereinafter the "Commission Report"), the text of §4-503(c)(6) which ultimately emerged, after minor change, as §522(d)(10)(E) as enacted states that the following property shall be exempt:

> (6) before or after retirement, such rights as the debtor may have under a profit sharing, pension, stock bonus, annuity, or similar plan which is established for the primary purpose of providing benefits under retirement by reason of age, health or length of service, and which is either (a) qualified under section 401(a) of the Internal Revenue Code, or any successor thereto, or (b) established by federal or state statute, to the extent in either case the debtor's interest therein is reasonably necessary for the support of the debtor and his dependents.

Report Of Commission On The Bankruptcy Laws of the United States §4-503(c)(6), H.R. Doc. 93-317, 93rd Cong., 1st Sess. Part II at 125 (1973), *reprinted* in 2 App. L. King, K. Klee & R. Levin, *Collier on Bankruptcy* 125 (15th ed. 1991). Further, Note 8 to §4-503 of the Commission Report clarifies

> The value of property exempted by clauses (4), (5), (7), (8) and (9) of subsection (c) is not limited. ***Benefits or rights under a retirement plan are exempt under clause (6) if the plan is qualified under I.R.C. §401(a). A limit is placed on the exemption since it is recognized that members of professional corporations and officers will have very substantial benefits.*** The exemption is limited to benefits 'reasonably necessary for the support of the debtor and his dependents.' This treatment is similar to that accorded interests in spendthrift trusts by §4-601(b) of the proposed Act. For a discussion of the options of the trustee as to reaching excess benefits, see the Note to §4-601.[4]

Id. at 129 (emphasis added).

Churches and governments do not employ "members of professional corporations," because churches and governments are not professional corporations. Nor do they generally have "corporate officers." In a similar vein, what church or government is likely to have a "stock bonus" plan? Moreover, non-insiders are less likely to be corporate officers, or accrue in nonqualified plans the "substantial benefits" with which the drafters of what ultimately became §522(d)(10)(E) were concerned. Significant plan balances are most likely to occur in plans which *are* tax qualified where earnings on the trust corpus build-up tax free, rather than vice-versa. These facts all support a congressional intent to exempt rights under all qualified pension plans in §522(d)(10)(E), not merely church and government plans, or nonqualified pension plans.

As written by the Commission, §4-503 exempted a debtor's rights to payments under all tax-qualified plans, subject to the "reasonable support" limitation. Congress, with no explanation whatsoever, ultimately placed one more limitation in the final text of §522(d)(10)(E) and precluded any exemption whatsoever for rights to payment where all the requirements of subsections (i) — (iii) are met; *i.e.* (i) the plan is *not* a qualified plan, or has been disqualified; (ii) the plan was established by an "insider," and (iii) the payment is on account of age or length of service. This does not detract in anyway

4. Note 10 to §4-601, at page 151 of Part II of the Commission Report, referring to the precursor of §541(c)(2), states "Subdivision (b) creates an exception as to spendthrift and support trusts. The beneficial interest of the debtor in income and principal needed to support the debtor and his dependents is not available to creditors. If the income exceeds such amount, the trustee can sell the right to the excess income, hold open the case so as to collect the income, or reach the principal to the extent in excess of the principal needed to generate the support income. The last option is subject, of course, to the rights of any third person in the principal."

from the preceding analysis which establishes that Congress intended rights under tax qualified plans — including both those required by ERISA to contain anti-alienation clauses and those not required to do so, such as church or government plans — to be exempted under §522(d)(10)(E).

Congress was well aware of ERISA when drafting pension exemptions under the new Bankruptcy Code, and the drafters intended that the Bankruptcy Code prevail over ERISA and permit a trustee to reach plan benefits in excess of those "reasonably necessary" for support of the debtor or dependents of the debtor. Commission Report Part I, Note 8 to §4-503, *supra*. Moreover, testimony given in 1975 by John J. Creedon, chairman of a committee of the American Life Insurance Association and Senior Vice President and General Counsel of Metropolitan Life Insurance Company of New York shows the following dialogue:

> Senator Burdick: What provision would you recommend to reconcile the provisions of the Employees [sic] Retirement Income Security Act with section 4-503(c)(6) of the Commission's bill and 4-503(e)(5) of the judge's bill [the exemption provision]?
>
> Mr. Creedon: This I guess had to do with the fact that a pension benefit is not assignable and the Commission's bill would allow an exemption only with respect to that portion of the pension plan that is necessary for the bankrupt's maintenance. *I guess something could be put in the Bankruptcy Act to the effect that notwithstanding the provision in ERISA or otherwise the trustee would be able to get to the excess.*

Hearings on S. 235 and 236 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 664, 678 (1975) (statement of John Creedon, American Life Insurance Association) (Government Printing Office 1975) (emphasis added).

Although Congress did not follow Mr. Creedon's advice and explicitly say that ERISA plan rights are included among the "federal" bankruptcy exemptions (to the extent reasonably

necessary for the support of the debtor), Congress did what should be deemed enough. It enacted language — *with the ERISA issue squarely before it* — that exempts "[t]he debtor's right to receive . . . a payment under a stock bonus, pension, profit sharing or similar plan . . . to the extent reasonably necessary for the debtor and any dependent of the debtor" and, moreover, denies any exemption whatsoever to rights to benefits when the requirements of §522(d)(10)(E)(i)-(iii) are all met. The plain meaning of this statutory language requires a finding that rights under all qualified plans under §401(a) of the Internal Revenue Code, together with the other enumerated I.R.C. Code sections, come into the bankruptcy estate, from which they may be exempted out. As this Court has observed:

> [T]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity of an acute and powerful intellect would discover.

Lynch v. Alford-Stephens Co., 267 U.S. 364, 370 (1925).

The argument that §522(d)(10)(E) is a "catchall" has been shown to be the product of the active imagination and creative thinking of debtors' counsel, ascribing to Congress and the members of the Commission On Bankruptcy Laws far more sophistication, and a much more limited intention than clearly had existed.

3. Congress did not intend that §522(d)(10)(E) be limited to exempting only pension rights which are in pay, or over which the debtor has a present right to take distribution. Pre-Code law and post-Code case law consistently hold that the §522(d)(10)(E) exemption encompasses rights to future distributions from undistributed corpus as well. Therefore, Congress could not have intended to exclude these rights to corpus from the bankruptcy estate, *ab initio*, under §541(c)(2).

Some courts suggest, contrary to the language of both §522(d)(10)(E) and §541(c)(2), and without support of any kind from the legislative history, that if §206(d)(1) of ERISA is applicable nonbankruptcy law for purposes of §541(c)(2) and pension assets in the hands of the plan trustee are thereby beyond the reach of the bankruptcy trustee, subsequent distributions from the plan during the pendency of the bankruptcy would nonetheless be subject to exemption under §522(d)(10)(E), thereby not making the latter statute superfluous. *See Velis v. Kardanis*, 949 F.2d 78, 81 (3rd Cir. 1991) and *Gladwell v. Harline (In re Harline)*, 950 F.2d 669, 675 (10th Cir. 1991). This fails, for several reasons.

First, the language of §522(d)(10)(E) exempts a debtor's "right" to payments "under" a plan. This evidences that Congress intended to exempt not only rights presently in pay status, and rights to corpus to the extent that the debtor has a right to take present distribution thereof, but also rights to future distributions from the corpus which cannot be received until a later date, to the extent that the debtor is presently vested in such rights. If Congress had intended to exempt "distributions" or "payments" it would not have used the term "rights" and "under." These terms clearly indicate that the terms of the plan document govern the scope of the exemption and the bankruptcy trustee's "right" to the debtor's benefits (where not subject to exclusion as a state law spendthrift trust). A pension plan typically gives a debtor "rights" to receive future payments commencing at normal retirement age well *before* that time, upon satisfaction of annual plan service requirements. This concept is called vesting, under which an employee who has been employed a requisite number of years (presently 5 years)[5] vests in his or her accrued benefits, and then in future benefit accruals every plan year thereafter in which the debtor works the requisite number of hours for benefit eligibility. These benefits are then non-forfeitable, even though they may not be distributed until normal retirement, or in some cases early retirement at age 55. Moreover, both the subject of the statute (stock bonuses, pensions, profit sharing and annuities) and the purpose of the statute (exemptions for reasonable necessities) support the interpretation that a right to future, not merely presently distributable plan benefits is contemplated, as these benefits are all usually presently vested "rights" to benefits to be received in the future.

5. 26 U.S.C. §411(a)(2); 29 U.S.C. §1053.

Several courts having found this logic compelling, concluded that §522(d)(10)(E) deals with a debtor's right to future, as well as present distributions, and granted exemption even though the debtor is not presently in pay status. *See, e.g., In re Cilek*, 115 Bankr. 974 (Bankr. W.D. Wis. 1990) and *In re Miller*, 33 Bankr. 549 (Bankr. D. Minn. 1983). A number of bankruptcy courts have construed state exemption statutes analogous to §522(d)(10)(E) in a similar manner, and permitted a debtor not in pay status to exempt rights to plan benefits distributable in the future. These decisions include, without limitation, *Matter of Weaver*, 98 Bankr. 497 (Bankr. D. Neb. 1988); *In re Schlee*, 60 Bankr. 524 (Bankr. D. Minn. 1986); and *In re Petit*, 57 Bankr. 362 (S.D. Iowa 1985).

Those holdings which allow a debtor not in pay status to exempt presently vested rights to future payments, treating the plan as a substitute for future wages, are faithful to the legislative history of the Bankruptcy Code and consistent with pre-Act law. H.R. Rep. No. 95-595, 95th Cong. 1st Sess. (1977), as reprinted in 2 App. L.King, K. Klee & R. Levin, *Collier on Bankruptcy* 362 (15th ed. 1991) (hereinafter "H.R. No. 95-595") states: "Paragraph 10 exempts certain benefits that are akin to future earnings of the debtor." H.R. Rep. 95-595 at 362. As to pre-Act law, see *Matter of Turpin*, 644 F.2d 472, 475 (5th Cir. 1981):

> [i]t appears that in *Nunnally* as here the bankrupt was not even entitled to receive any of these benefits until some time in the future. In *Nunnally* [506 F.2d 1024] we concluded that awarding the bankrupt's retirement benefits to the trustee would deprive the bankrupt of a genuine fresh start . . . .Providing the bankrupt with a 'fresh start' means assuring him that assets to which he may become entitled *in the future* will be acquired free of

any pre-bankruptcy obligations. Future wages may not be garnished to pay those obligations and pension benefits received in the future, even though they may be the product of pre-bankruptcy contributions to a pension fund, are a substitute for future wages and thus pass to the bankrupt free of the claims of prebankruptcy creditors (emphasis in the original).

The only significant change is that the Bankruptcy Code now imposes a "reasonable necessity" limitation on the exemption. This Court recently stated that it "[h]as been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." *Dewsnup v. Timm*, 112 S.Ct. 773,779 (1992). Here, it is clear that pre-Code law permitted exemption of rights to both future and present payments. Because there is no support whatsoever in the legislative history supporting the position that §522(d)(10)(E) changed pre-Code law so as to apply only to, and exempt rights to present payment, this position should be rejected.

The upshot of the foregoing is, that if Congress intended vested rights in plan corpus to be exempt under §522(d)(10)(E) to the extent needed to produce a *future* income stream reasonably necessary for the debtor's support, if any, *then it could not have intended that the same corpus be excluded from the estate under §541(c)(2)*. Thus, those who would exclude ERISA pensions from property of the estate cannot convincingly argue that the trustee's right to obtain only rights which are in, or can be the subject of present distributions from the trust, gives meaning to §522(d)(10)(E).

If pension assets attributable to a debtor's plan interest are excluded from "property of the estate" by virtue of §541(c)(2), they cannot later come into the estate when they are later "distributed." Once property is excluded from the estate it remains so, permanently. Two situations illustrate this. First, consider the analogous circumstance of a debtor who claims "state" exemptions, and holds property with his or her non-

debtor spouse in tenants by the entirety. In many cases, "applicable nonbankruptcy" local law will effectively exempt this property from the bankruptcy estate under §522(b)(2)(B), because property held in tenancy by the entireties cannot be reached under local law, except by joint creditors. Cash proceeds of entireties property, whether held in cash at the petition date or converted into cash by a post-petition sale of the entireties property are similarly exempt, at least where the proceeds are intended to be reinvested in other entireties property, or where the state recognizes a tenancy by the entireties in cash as a form of personal property. *See Muskegon Lumber & Fuel Company v. Johnson*, 338 Mich. 655, 62 N.W. 2d 619 (1954) (proceeds from sale of entireties property exempt from process in Michigan where it was clear that the intent of the husband and wife was to immediately invest their funds to acquire other entireties property); *Accord Matter of Jones*, 31 Bankr. 372, 375 n. 4 (Bankr. E.D. Mich. 1983); and *Pitts v. United States*, 408 S.E. 2d 901 (Va. 1991) (notes received in exchange for property held by entireties are also held by the entireties, even where the notes themselves do not contain language indicating a right of survivorship). By analogy, that a debtor's interest excluded under §541(c)(2) is later converted into cash does not necessarily bring it into the estate.

Also, consider a troubled employer with an over-funded defined benefit pension plan, as here. The employer terminates the plan, purchases from a well capitalized insurance company annuities covering all individual future employee benefits remaining to be paid under terms of the plan, and after paying the IRS an excise tax recovers the plan surplus in reversion. Employees, who may be in bankruptcy, will receive, currently, a distribution "in-kind" in the form of insurance company annuity certificate(s) in his or her personal name, which promise to pay benefits due by the plan, as fixed as of the plan termination date.[6] If the Third and Tenth Circuit's positions were correct, then the debtor's interest in such plan would come into the bankruptcy estate, subject to

6. *See* Taige, "Preparing for Asset Reversions on Termination of Defined-Benefit Plans," 63 *J. of Tax'n* 20 (July, 1985).

exemption under §522(d)(10)(E). However, a debtor in these circumstances would fare poorly, at least in comparison to a similarly situated debtor employed by a healthy company which did not terminate its corporate plan during the pendency of the individual employee's bankruptcy, where under these courts rationale the plan benefits would remain outside the estate under §541(c)(2). In the former case, through no fault or action of the debtor, pension benefits not payable currently in cash would be exposed to the Chapter 7 trustee. In the latter case (the debtor employed by the solvent company), if ERISA were indeed "applicable nonbankruptcy law" for purposes of §541(c)(2) the plan benefits would not be so exposed. Surely Congress could not have intended such a dichotomy in treatment.

B. The legislative history of §541(c)(1) of the Bankruptcy Code indicates that the term "applicable nonbankruptcy law" as used therein refers to "local rules of transferability". This strongly suggests that the term as used in §541(c)(2) refers to state law as well.

The term "applicable nonbankruptcy law" as used in §541(c)(1) refers to state law. See Commission Report, *supra*, Part I at 193 where, with respect to general recommendations concerning "property of the estate" it states "Consistent with the recommendations that the property subject to administration not be determined by local rules of transferability, the Commission recommends that any prohibition on the transfer of property by the debtor and any provision for forfeiture or termination as a result of the filing of a petition be unenforceable as to property of the estate, except as qualified in the case of spendthrift trusts." The normal rule of statutory construction, usually applicable to use of identical words in the same section of the same enactment, is that they are intended to have the same meaning. *Dewsnup v. Timm*, 112 S.Ct. at 780-781 (Scalia and Souter, JJ, dissenting).

C. The term "applicable nonbankruptcy law" is ambiguous. As used in §522(b)(2)(B) (and §541(c)(1)), it refers solely to state law, absent any express limitation to state law alone. It is also rendered ambiguous by inconsistent statutory language in §522(d)(10)(E). Accordingly, the legislative history of §541(c)(2) must be consulted, which establishes that the exclusion in §541(c)(2) is limited to state spendthrift trust law.

1. The term "applicable nonbankruptcy law" is ambiguous, because in the context of §522(b)(2)(B) (dealing with tenancy by the entirety), and §541(c)(1) as well, the term "applicable nonbankruptcy law" means *only* state law, absent any explicit limitation to state law alone.

The term "applicable nonbankruptcy law" as found in §541(c)(2) is ambiguous. What is and is not relevant, suitable or fit law to be applied cannot be determined from the face of §541(c)(2). The term "applicable nonbankruptcy law" is a ubiquitous phrase used over 15 times in the Bankruptcy Code; each use of the term "nonbankruptcy law" is necessarily statute specific due to the use of the qualifying adjective "applicable." That the identical words "applicable nonbankruptcy law" are used in different parts of the Bankruptcy Code does not necessarily mean that they have the same meaning in each place.

Because what the term "applicable nonbankruptcy law" does and does not mean within the context of a particular statute is not readily apparent on its face, the term is ambiguous. *See Tabor v. Employee Benefits Committee*, 121 Bankr. 1006,1011 (Bankr. S.D. Ind. 1990) *aff'd* 127 Bankr. 194 (S.D. Ind. 1991), rejecting specifically the contrary decision in *Anderson v. Raine (In re Moore)*, 907 F.2d 1476 (4th Cir. 1990). The fact that there is a 5-4 split of opinion among the Circuit Courts of Appeal which have considered the issue of whether §206(d)(1) of ERISA represents "applicable nonbankruptcy law" for purposes of §541(c)(2), and the relationship between the construction of §541(c)(2) advanced

by the Respondent and the language of §522(d)(10)(E) also serve to establish that the term "applicable nonbankruptcy law" is ambiguous. The "majority rule," followed in the Ninth, Eleventh, Eighth, Fifth and Second Circuits, is that the phrase "applicable nonbankruptcy law" in §541(c)(2) only applies to state spendthrift trust law. *See Daniel v. Security Pacific Bank (In re Daniel)*, 771 F.2d 1352 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Lichstrahl v. Bankers Trust (In re Lichstrahl)*, 750 F.2d 1488 (11th Cir. 1985); *Samore v. Graham (In re Graham)*, 726 F.2d 1268 (8th Cir. 1984); *Goff v. Taylor (In re Goff)*, 706 F.2d 574 (5th Cir. 1983); *Regan v. Ross*, 691 F.2d 81 (2d Cir. 1982); *see also Heitkamp v. Dyke (In re Dyke)*, 943 F.2d 1435 (5th Cir. 1991) (affirming position taken in *Goff* and declining to follow *In re Moore*); *Reed v. Drummond (In re Reed)*, 951 F.2d 1046 (9th Cir., 1991) (affirming position previously taken in *In re Daniel* and declining to follow *In re Moore*); *Pitrat v. Garlikov*, 947 F.2d 419 (9th Cir. 1991) (same). *See also In re Perkins*, 902 F.2d 1254, 1256 n.1 (7th Cir. 1990) (noting in *dicta* that "[t]he legislative history of §541(c)(2) indicates that Congress enacted the provision in order to exempt spendthrift trusts from the debtor's estate").

By contrast, the minority position advocated by Respondent and adopted by the Fourth, Sixth, Third and Tenth Circuits is that §206(d)(1) of ERISA is "applicable nonbankruptcy law" for purposes of §541(c)(2). *See In re Moore, supra*, *Forbes v. Lucas (In re Lucas)*, 924 F.2d 597 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 2275 (1991); *Velis v. Kardanis, supra*; *In re Harline, supra*.

In rejecting a narrow interpretation of §541(c)(2), the Fourth Circuit in *In re Moore* held that such an interpretation

> [c]annot be squared with the section's broad language. 'Applicable nonbankruptcy law' means precisely what it says: all laws, state and federal, under which a transfer restriction is enforceable. Nothing in the phrase 'applicable nonbankruptcy law' or in the remainder of §541(c)(2) suggests that the phrase refers exclusively to state law, much less to state spendthrift trust law.

907 F.2d 1476, 1477.

This analysis of the minority position is flawed for there are two situations where the term "applicable nonbankruptcy law" appears in the Bankruptcy Code and refers solely to state law. Section 522(b)(2)(B) permits a debtor who chooses "state" exemptions to exempt tenancy by the entireties and joint tenancy property in states in which assets so held are not subject to execution under local law by non-joint creditors. In this context, the term "applicable nonbankruptcy law" must mean state law, because property rights are determined solely by state law. *See, e.g., In re Bialon*, 67 Bankr. 451, 453 (Bankr. W.D. Pa. 1986) ("A debtor may claim as exempt from the bankruptcy estate entireties property pursuant to §522(b)(2)(B), if that property is immune from process under applicable nonbankruptcy law. The question we must decide is whether the Debtor's entireties property in this instance is immune from process under Pennsylvania law.") *See also White v. White (In re White)*, 851 F.2d 170, 173 (6th Cir. 1988) ("The Bankruptcy Code does not define a debtor's interest in property; the answer to that question must be made after reference to state law"). *See also* §541(c)(1) as discussed *supra*.

Accordingly, Respondent's assertion, based on the holdings of *Moore* and *Lucas* that the phrase *always* (and thus clearly and unambiguously) refers to *both* state and federal law whenever it is used in the Bankruptcy Code, is simply incorrect.

2. The Legislative History of §541(c)(2) should be consulted because the term "applicable nonbankruptcy law," as used in the Bankruptcy Code, is ambiguous.

The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of the statute will produce a result demonstrably at odds with the intention of its drafters. *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241-242, 109 S.Ct. 1026, 1030-1031, 103 L.Ed 2d 290 (1989). Similarly, when the Court finds the terms of a

statute unambiguous judicial inquiry is complete, except in rare and exceptional circumstances. *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed. 2d 633 (1981). Obviously, the "plain meaning" rule can, however, have no applicability unless the plain meaning is conclusive. This cannot be the case where a particular term is "ambiguous."

Where the resolution of a question of federal law turns on a statute and the intention of Congress, it is appropriate to look to the statutory language, and then to the legislative history if the statute is unclear. *Toibb v. Radloff*, ___ U.S. ___, 111 S. Ct. 2197, 2200 (1991). In so doing, a statute is to be read as a whole, since the meaning of the statutory language, plain or not, depends on context. *King v. St. Vincent's Hosp.*, ___ U.S. ___, 112 S. Ct. 570, 574 (1991).

Thus, in the instant case, where §541(c)(2) is unclear because the term "applicable nonbankruptcy law" is ambiguous, it is appropriate to consider the legislative history of §541(c)(2) in divining Congressional intent.

3. The legislative history of §541(c)(2) establishes that it was intended merely to carryover prior law which excludes from property of the estate the debtor's interest in a spendthrift trust protected under applicable state law.

The legislative history of §541(c)(2) suggests a very limited intention. H.R. Rep. No. 95-595, *supra* states at 369 that:

> Subsection (c) [of Section 541] invalidates restrictions on the transfer of property of the debtor, in order that all of the interests of the debtor in property will become property of the estate . . . Paragraph (2) of subsection (c), however, *preserves* restrictions on transfer of a spendthrift trust to the extent that the restriction is enforceable under applicable nonbankruptcy law (emphasis added).

Moreover, in its overview of the new legislation the House Report states:

> The bill also *continues over* the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable *State* law. The bankruptcy of the beneficiary should not be permitted to defeat the legitimate expectations of the settlor of the trust.

Id. at 176 (emphasis added).

4. Because a blanket exclusion for all ERISA plans under §541(c)(2) would be a significant change in pre-Code practice, because the statute is ambiguous, and because there is no discussion of such a change in the legislative history, this court should reject Respondent's position that §206(d)(1) of ERISA is "applicable bankruptcy law" for purposes of §541(c)(2).

In *Dewsnup v. Timm*, ___ U.S. ___, 112 S. Ct. 773,779 (1991) this Court held that:

> When Congress amends the bankruptcy laws, it does not write on a 'clean slate.' *See Emil v. Hanley*, 318 U.S. 515, 523, 63 S. Ct. 690-691, 87 L.Ed. 954 (1943). Furthermore, this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history. [citations omitted]. Of course, where the language is unambiguous, silence in the legislative history cannot be controlling. But given the ambiguity here, to attribute to Congress the intention to grant a debtor the broad new remedy . . . without the new remedy's being mentioned somewhere in the Code itself or in the annals of Congress is not plausible, in our view, and is contrary to basic bankruptcy principles.

Here, finding that there is a blanket exclusion from property of the estate for rights under pension and related plans which contain an ERISA mandated anti-alienation clause — *i.e.*, that §206(d)(1) of ERISA represents "applicable nonbankruptcy

law" for purposes of §541(c)(2)—would be a major change in pre-Code law. Not only is there no suggestion whatsoever in the legislative history of any intention to make such a change, there is a clear suggestion to the contrary—that all that is intended is to "carryover" pre-Code law with respect to the exclusion of state law spendthrift trusts. Under these facts, and because the statute as written is ambiguous, this Court should reject Respondent's argument.

D. ERISA's anti-alienation provisions do not preempt the Bankruptcy Code.

1. ERISA does not supersede, alter, amend or impair the Bankruptcy Code or any other law of the United States, other than federal pension benefit laws. Thus, just as the federal tax lien statute overrides an ERISA anti-alienation clause, so should the Bankruptcy Code.

Section 514(d) of ERISA provides that "[n]othing in this [Act] shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States [except preexisting federal pension and retirement benefit law] or any rule or regulation issued under such law." 29 U.S.C. §1144(d). From this statutory language is it clear that ERISA was not intended to override Federal bankruptcy law. The broad sweep of the definition of "property" belonging to the bankruptcy estate found in 11 U.S.C. §541(a)(1) surely encompasses a debtor's interest in retirement plans as a general rule, whether ERISA and/or tax-qualified or not.

Unless §206(d)(1) of ERISA itself qualifies as "*applicable* nonbankruptcy law" for purposes of §541(c)(2), a debtor's interest in an ERISA plan will come into the bankruptcy estate. Courts have so recognized, stating "ERISA was not intended to affect the operation of other federal laws including federal bankruptcy laws. If a distinction is created by operation of bankruptcy law which might conflict with ERISA, bankruptcy law prevails." *In re Goff, supra*, 706 F.2d at 589; *Accord Levine v. Central States, Southeast & Southwest Areas Pension Fund (In re Ottawa Cartage, Inc.)*, 55 Bankr. 371, 377-78 (N.D. Ill. 1985).

Thus, Federal tax liens have been held to override an ERISA anti-alienation clause under 26 U.S.C. §6321, and under §522(c)(2)(B) a claim of federal pension exemption under §522(d)(10(E) as well. *See In re Perkins*, 134 Bankr. 408 (Bankr. E.D. Cal. 1991). There, Perkins was 52 years old and held a vested right to a defined pension benefit under a union plan. He was, however, not entitled to receive payments until age 62, at which time monthly payments of $574/month would commence and continue until death. Perkins argued that the fact his rights to the pension were restricted from transfer by the plan's ERISA required spendthrift clause established that his pension rights were not property of the estate and, if they were property of the estate, they had no value, as the pension was not yet in pay status. The court properly rejected both arguments.

Just as the Internal Revenue Code, a federal statute, overrides an ERISA anti-alienation clause, so too should the Bankruptcy Code. 29 U.S.C. §1144(d).

2. Cases which hold that ERISA controls over conflicting state law are inapposite.

In contrast to federal law, ERISA will override state law. 29 U.S.C. §1144(a).[7] "But, [w]hile ERISA-required anti-alienation clauses may preempt state law and preclude the use of judgment enforcement devices thereunder, they do not preclude inclusion of pension benefits in a debtor's bankruptcy estate by operation of federal law." *In re Graham, supra*, at 1273.

The decision in *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 110 S.Ct. 680 (1990), cited by Respondent (Brief in Opposition at 21-22) in no way alters this

7. "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter related to any employee benefit plan described in section 4(a) [29 U.S.C. §1003(a)] and not exempt under section 4(b) [29 U.S.C. §1003(b)]. This section shall take effect on January 1, 1975."

conclusion, or suggests that ERISA's anti-alienation provisions override otherwise applicable federal bankruptcy statutes. There, Guidry, a former union official, pled guilty to embezzlement of funds from the union. Two of the union plans forfeited his benefits, and he filed suit. The union intervened and stipulated with Guidry as to a money judgment in its favor. This Court overturned a constructive trust imposed on Guidry's pension benefits, and declined to find that "other appropriate relief" available to the labor unions under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §501(b), would override the anti-alienation provisions of ERISA, a more specific statute.

In the instant case *Guidry* is distinguishable. Mr. Guidry was not in bankruptcy, and the decision makes no reference of any kind to the Bankruptcy Code. Here, the issue in the case at bar is not whether or not to impose an equitable exception to ERISA, but how to resolve a conflict between two federal statutes, ERISA and the Bankruptcy Code. In the bankruptcy context:

> [t]wo specific statutory provisions are in conflict. It is *not* simply the *general* purposes behind the Bankruptcy Code that have led courts to conclude that ERISA qualified pension plans are included in the debtor's estate, but *specific* statutory mandates. Therefore, the court will not rely on *Guidry*, which is clearly distinguishable...

Tabor v. Employee Benefits Committee, 121 Bankr. 1006, 1011 (Bankr. S.D. Ind. 1990), *aff'd* 127 Bankr. 194 (S.D. Ind. 1991). *See also In re Martin*, 119 Bankr. 297 (Bankr. M.D. Fla. 1990).

E. Finding For The Petitioner Will Not Disqualify The CFC Plan.

Respondent raises a "red herring" when he points to risk of an alleged tax disqualification if his position is not supported. Brief In Opposition, footnote 3 page 12. It is true that in several private Letter Rulings the IRS has threatened to disqualify a pension plan if it complied with a Bankruptcy Court order directing payment to the estate of the debtor's

pension rights. *See* PLR 9011037, PLR 8910035 and PLR 8130120. However, to the best of counsel's knowledge the IRS has *never* actually disqualified a plan on this basis, and none of the foregoing private letter rulings may properly be cited as precedent. 26 U.S.C. §6110(j)(3).

More importantly, a wealth of decisions which can be relied upon as precedent hold that compliance with a bankruptcy court order directing turnover, where appropriate, of pension assets will not disqualify the plan, and there are no reported decisions to the contrary. *See Regan v. Ross*, 691 F.2d 81,87 (2d. Cir. 1982); *In re Threet*, 118 Bankr 805, 808-809 (Bankr. N.D. Okl. 1990); *In re Pulley*, 111 Bankr. 715, 742-746 (Bankr. N.D. Ind. 1989); *In re Gallagher*, 101 Bankr. 594 (Bankr. W.D. Mo. 1989); *In re Babo*, 81 Bankr. 389 (Bankr. W.D. Pa. 1988), *reconsideration denied* 97 Bankr. 827, 830 (Bankr. W.D. Pa. 1988); *In re DeWeese*, 47 Bankr. 251, 256 (Bankr. W.D. N.C. 1985); and *In re Di Piazza*, 29 Bankr. 916, 922-923 (Bankr. N.D. Ill. 1983). Most decisions have found an "implied amendment" of §206(d) of ERISA upon enactment of the Bankruptcy Code, "notwithstanding the strong judicial policy disfavoring the inference that a statute has been repealed sub silentio by subsequent legislation." *See, e.g., Regan v. Ross, supra* at 87. Based on the foregoing, the threat of plan disqualification is a "straw man" argument, the product of the fertile imagination of pension and debtors' lawyers. The IRS has informally expressed a position; it has been rejected by the courts. But *c.f. In re Moore*, 907 F.2d at 1480-1481 (neither citing or otherwise distinguishing any of the preceding authorities).

F. It is not necessary to exclude ERISA pension plans from "property of the estate" to give debtors a "fresh start." Debtors are free to elect state exemptions, including homestead, tenancy by the entireties and pension exemptions, because ERISA does not override state exemption statutes.

It is possible that behind tortured constructions of §541(c)(2) which construe §206(d)(1) of ERISA as "applicable nonbankruptcy law" there lies an unstated concern that

debtors will lose their rights to claim favorable state law homestead exemptions (and in some states such as the District of Columbia which prohibit levy except as to joint creditors, exemptions for assets held in tenancy by the entireties as well) by being forced to claim "federal" exemptions in order to exempt rights under ERISA qualified plans. This fear is grounded in the belief that no state law pension exemption can be valid due to ERISA's preemption. Supposedly, the debtor faces the Hobson's choice of choosing federal exemptions to protect his or her pension rights under §522(d)(10)(E), at a cost of loss of favorable state exemptions, or vice versa. This result is avoided if §206(d)(1) of ERISA can somehow be construed to be "applicable nonbankruptcy law" for purposes of §541(c)(2), as the related pension benefits are then excluded from the estate *ab initio*. To the extent this concern exists, it is displaced by *In re Dyke, supra* and *In the Matter of Volpe*, 943 F.2d 1451 (5th Cir. 1991). These decisions hold that ERISA does not pre-empt state law exemptions for ERISA qualified plans. The state exemption supports a principal goal of the Bankruptcy Code, the debtor's "fresh start", and is thus protected, as ERISA does not override the Bankruptcy Code.

G. Finding for the Petitioner does not do violence to ERISA's goal of uniform treatment of pensions, which is available under §522(d)(10)(E).

It is argued that the position advanced by the Petitioner would somehow "frustrate" the purposes of ERISA because the treatment of a debtor's interests in pension funds would vary from state to state. In the first place, this begs the question. The legislative history shows Congress had no intention to protect pension funds under § 541(c)(2) (except incidentally to the extent such funds are also protected by state spendthrift trust law). Moreover, if Congress desired a uniform treatment of a debtor's interest in ERISA pension plans in bankruptcy it could have prohibited the States from opting out. Despite initial recommendations from the Commission On Bankruptcy Laws to the contrary it chose not to do so, and continued to permit the choice of state law exemption rights in recognition of the varying circumstances

in different parts of the country, and the States interest in regulating credit. Congress' choice to permit diversity as to exemptions (for example, some states have unlimited homestead exemptions and others do not) should not be held against the Petitioner here. Further, some degree of uniformity does exist, at least in those states which have not opted out of the "federal" exemptions, where §522(d)(10)(E) can be expected to be uniformly applied.

II. WHETHER ERISA IS "FEDERAL LAW, OTHER THAN SUBSECTION (d)" FOR PURPOSES OF SECTION 522(b)(2)(A) IS NOT PROPERLY BEFORE THIS COURT AND SHOULD BE DECIDED ON REMAND.

An issue not properly before this Court is whether ERISA represents "Federal law, other than subsection (d)" in the case of a debtor such as Mr. Shumate who uses "state" exemptions. Notwithstanding the Fourth Circuit's express reservation of opinion on this issue below *(Shumate v. Patterson*, 943 F.2d 362,365-366 (4th Cir. 1991)), both the Petitioner and the Respondent ask this Court to resolve this issue. *Petition For Writ of Certiorari* at i; *Brief In Opposition* at i.

Amicus Tatge does not believe that the Court should reach this difficult issue. Accordingly, Tatge supports neither party, and believes that this question should be resolved by the Fourth Circuit Court of Appeals on remand. If the Fourth Circuit finds that ERISA is "other federal law" for purposes of §522(b)(2)(A) the Respondent will prevail. In contrast, if on remand the Fourth Circuit determines that this is not the case and, further, that the CFC Plan is not a spendthrift trust under Virginia law, then the Petitioner will prevail.

CONCLUSION

For the reasons stated herein, and by the Petitioner, Amicus Tatge believes that the Petitioner's position on §541(c)(2) should prevail. Because an issue remains whether Shumate's residual interest in the CFC Plan represents "property that is exempt under Federal law, other than subsection (d) of this

section . . . ,'' within the meaning of 11 U.S.C. §522(b)(2)(A), the cause should be REVERSED and REMANDED.

This the 6th day of March, 1992.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) true and correct copies of the foregoing Motion For Leave To File Amicus Curiae Brief, And Amicus Curiae Brief of David B. Tatge, Trustee, Urging Reversal And Remand were mailed by first class mail, postage prepaid to counsel for the Petitioner, G. Stephen Agee, Esquire, Osterhoudt, Ferguson, Natt, Aheron & Agee, P.C., 1919 Electric Road, S.W., Box 20068, Roanoke, Virginia 24018, and to counsel for the Respondent, Robert A. Lefkowitz, Esquire, Maloney, Yeatts & Barr, P.C., 600 Ross Building, 801 East Main Street, Richmond, Virginia 23219-2906 this 6th day of March, 1992.

David B. Tatge